

Hinds County Human Resource Agency and International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, Petitioner. Case 18-RC-16579 (formerly 15-RC-8239)

August 25, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

On November 22, 1999, the Regional Director of Region 18 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found that the Employer is not a political subdivision of the State of Mississippi exempt from the Board's jurisdiction under Section 2(2) of the National Labor Relations Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that the Regional Director erred in finding the Employer not to be a political subdivision.

By order dated January 6, 2000, the Board granted the Employer's request for review. Thereafter, the Employer filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the Employer's brief on review, and finds that the Employer is exempt from Board jurisdiction under Section 2(2) of the Act as a political subdivision of the State of Mississippi.

An Employer is a political subdivision if it is either: (1) created directly by the State so as to constitute a department or administrative arm of government; or (2) administered by individuals who are responsible to public officials or the general public. *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). The record demonstrates, and we find, that the Employer is exempt under the first prong of this test.¹

The Hinds County Board of Supervisors (HCBS)² created the Employer in 1975, pursuant to sections 17-15-1 through 15-11 of the Mississippi State Code, to administer programs designed to assist low income people. Programs currently administered by the Employer include: Hinds County Project Head Start, Community Services Block Grant, Low Income Energy Assistance Program, Home Weatherization Assistance Program, Home Delivered Meals, Homemaker Services, Rural General Public

Transportation, After School Enrichment Program, Adolescent Offender Program, and Americorps. The pertinent part of the enabling statute reads: "The boards of supervisors and the municipal governing boards of the various counties and cities of the State of Mississippi are hereby empowered to create human resource agencies which may be comprised of one or more counties, cities, or any combination thereof."³ It is well established that the National Labor Relations Board recognizes entities created by county governments pursuant to an enabling state statute, as having been directly created by the state under *Hawkins*. See *Madison County Mental Health Center*, 253 NLRB 258, 259 (1980); and *Assn. for the Developmentally Disabled*, 231 NLRB 784, 786 (1977). We therefore find that the Employer was created directly by the state.

The issue remains as to whether the Employer was created by HCBS so as "to constitute a department or administrative arm of government." It is clear from the language of the enabling statute that it was the legislature's intention that human resource agencies, such as the Employer, be operated under local governmental control.⁴ Additionally, subsequent rulings by the Mississippi Attorney General and other state entities indicate that the State of Mississippi views the Employer as an exempt political entity.⁵ We are mindful that in *Hawkins*, the Supreme Court found such state determinations are not controlling in ascertaining whether an entity is a political subdivision. However, the Court also found that such determinations are worthy of careful consideration,⁶ and the Board has found the state's characterization of an entity to be an important factor in determining the more specific issue of whether the Employer was created so as to constitute a department or administrative arm of government. See *University of Vermont*, 297 NLRB 291, 295 (1989); *New York Institute for the Blind*, 254 NLRB 664, 667 (1981).

³ Miss. Code Ann. §17-15-1.

⁴ "It is the express intention of this chapter that agencies created hereunder shall be operated under local governmental control and shall be responsible for administration of programs heretofore conducted by community action agencies and related programs authorized by federal law." Miss. Code Ann. §17-15-1.

⁵ Specifically, the Mississippi Attorney General has found that because the Employer is a governmental entity it is subject to the Public Purchase Act, which requires competitive bidding, and it cannot conduct raffles. The State Tax Commission also considers the Employer to be a governmental entity, as indicated in their letter exempting the Employer from sales tax pursuant to Miss. Code Ann. 27-65-105(A). The Mississippi Torts Claim Board issued a certificate of coverage for the Employer, approving liability coverage for the Employer as a "political subdivision." Additionally, the Mississippi Ethics Committee, which has the authority to issue advisory opinions "when any public official requests in writing such an advisory opinion," also considers the Employer to be a governmental entity, as it has issued opinions regarding the Employer's operations in response to the Employer's inquiries.

⁶ *Hawkins*, 402 U.S. at 602.

¹ As we find that the Employer satisfies the first prong of the *Hawkins* test, we find it unnecessary to determine whether the Employer is administered by individuals who are responsible to public officials or to the general public.

² It has been stipulated that the HCBS is the governing authority of Hinds County. The HCBS is elected by the general electorate with each of the five members representing a separate geographical district.

There is also significant governmental control over the Employer's budget, auditing, and operations. The Employer receives virtually all of its funding from the state, county, and the Federal government directly and in the form of block grants.⁷ Pursuant to the enabling statute, HCBS reviews the Employer's annual audit and has the power to call the Employer in for clarification. In addition, the Employer's financial records are subject to audit by the HCBS and by the Mississippi auditor of public accounts.⁸ The Employer also makes a yearly presentation to HCBS to justify the annual allocation of funds from Hinds County, and meets with HCBS twice a year to explain progress on goals achieved. Additionally, Kenn Cockrell, the Employer's executive director, testified that the use of funds received through Federal block grants are restricted by minimal Federal requirements and more restrictive state plan requirements promulgated through the Mississippi Department of Human Services. Finally, the Mississippi Attorney General has found that the Employer can borrow money only as authorized by the legislature.⁹ Thus, the record establishes significant governmental control over the Employer's budget and audit procedures which supports a finding that the Employer was created as an administrative arm of the State. *Northampton*, 257 NLRB 870, 872 (1981) (finding employer to be an administrative arm of government when, inter alia, virtually all its funds come from governmental sources and the amount and use of those funds is specified and controlled by governmental contracts); *Madison County*, 253 NLRB at 259 (finding employer to be an administrative arm of government when, inter alia, 80 percent of the employer's funding comes from governmental sources and its fee structure is subject to approval of the Madison County Health and Retirement Board). Cf. *Jervis Public Library Assn.*, 262 NLRB 1386, 1388 (1982) (significant control over the employer's expenditures established by reason of required submission of annual budget to governmental entity prior to funding approval). See also *Camden-Clark Memorial Hospital*, 221 NLRB 945, 947 (1975) (finding employer to be an administrative arm of government when, inter alia, it receives funding from government sources subject to the general control and direction of its board of trustees).

Beyond budgetary control, the record demonstrates that the enabling statute has mandated that the HCBS have oversight of the Employer's operations. Specifically, HCBS must ratify and approve the Employer's

bylaws and any subsequent changes to those bylaws. The HCBS must also approve each of the Employer's new board members.

We recognize that the Employer's board members have the power to adopt bylaws, to hire senior staff (including the executive director), and determine the Employer's programs and priorities. Further, as discussed by the Regional Director, the Mississippi Attorney General has clearly indicated that the Employer's board members are responsible for the Employer's plans, priorities, and activities, and "may not delegate those responsibilities to other county officials."¹⁰ Such responsibilities, however, do not negate a finding that the Employer was created as an administrative arm of government. See, e.g., *Jervis Public Library Assn.*, supra; *Camden-Clark Memorial Hospital*, 221 NLRB 945, 946-948 (1975).

There are other facts that support a finding that the Employer was created as an administrative arm of government. For example, the Employer is exempt from Federal and state income tax as well as state sales tax.¹¹ Further, employees have the option of participating in the state retirement system.¹²

In sum, based on the facts set forth above we find that the Employer satisfies the first prong of *Hawkins* and thus is exempt from our jurisdiction as a political subdivision.¹³ In so concluding, we rely particularly on the following facts: the Employer was created directly by the HCBS pursuant to a state statute specifically granting

¹⁰ Cited in Miss. Code Ann. § 17-15-1.

¹¹ *Hawkins*, 402 U.S. at 602; *Camden-Clark Memorial Hospital*, 221 NLRB at 945. We note that while the Employer is exempt from state sales tax because it is considered a political entity, it is exempt from Federal income tax as a 501(c)(3) organization, rather than as a political subdivision under 26 U.S.C. § 115.

¹² *Prairie Home Cemetery*, 266 NLRB 678 (1983); *Jervis*, 262 NLRB at 1388 fn. 13; *Assn. of the Developmentally Disabled*, supra. In all three of these cases the fact that the employees participated in the state retirement system, without regard to whether or not they were required to do so, weighed in favor of a finding that the first prong of *Hawkins* was satisfied.

¹³ In concluding that the first prong of *Hawkins* had not been satisfied, the Regional Director likened the facts of this case to those found in *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988), in which the Board found that the employer was not a political subdivision. We find *St. Paul* to be distinguishable. In *St. Paul*, the Board found that although the Medical Center was once an exempt political entity, the balance of the relevant statutory provisions of the new State act creating a nonprofit public corporation indicated that the State no longer intended the Medical Center and hospital subsidiary corporation to be established as departments or administrative arms of the government. By contrast, in the case before us the enabling state statute specifically indicates that it is the legislature's express intention that the relevant human resource agencies operate under local governmental control. The Board distinguished *St. Paul* from *Camden-Clark Memorial Hospital*, supra (where the Board reached the opposite result), citing the fact that the hospital in *Camden-Clark* was not separately incorporated or otherwise organized so as to have a separate legal identity apart from the city. We note that in the instant case, the Employer is not separately incorporated and there is no evidence in the record to indicate that it has a separate legal identity apart from the city.

⁷ The Regional Director noted that for the fiscal year 1996, Hinds County budgeted a contribution of \$200,000, and the State of Mississippi directly contributed \$183,447. The Employer's overall budget was \$13,535,343 for fiscal year 1996.

⁸ Miss. Code Ann. § 17-15-9.

⁹ See *Prairie Home Cemetery*, 266 NLRB 678 (1983) (fact that enabling city ordinance provides that the employer's board cannot incur liability or acquire debt without first having submitted full and specific approval of county commissioners weighed in favor of finding that employer was an administrative arm of government).

county Boards the power to establish and operate Human Resource agencies; the state statute specifically indicated that such agencies are to be operated under local government control; the Employer receives virtually all of its funds from State and Federal governmental sources; and the amount and use of those funds is specified and controlled by governmental contracts and grants.¹⁴ See *Northampton Center for Children*, 257 NLRB at 872.

As we have concluded that the Employer is a political subdivision exempt from coverage of the Act, we shall dismiss the instant petition.

ORDER

The petition is dismissed.

CHAIRMAN TRUESDALE, concurring.

I agree with my colleagues that the Employer is exempt from the Board's jurisdiction under Section 2(2) of the Act as an exempt political subdivision and that the petition should be dismissed. In my view, however, a majority of the individuals on the Employer's board of directors are public officials or individuals responsible to the general electorate and, therefore, the Employer satisfies the second prong of the test under *NLRB v. Natural Gas Utility of Hawkins County, Tennessee*, 402 U.S. 600 (1971).¹

In *Hawkins*, the Supreme Court held that an exempt political subdivision under Section 2(2) of the Act is an entity that is either (1) created directly by the state, so as to constitute an administrative arm of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. 402 U.S. at 604-605. In order for an entity to be "administered by" individuals responsible to public officials or the general electorate, those individuals must comprise a majority of that employer's governing board. *Jefferson County Community Center v. NLRB*, 732 F.2d 122, 126 (10th Cir. 1984).

In the instant case, a tripartite board of directors governs the Employer, a provider of programs and services to ameliorate the causes and conditions of poverty in Hind County, Mississippi.² It is undisputed that one-

third of the Board of Directors, consisting of each supervisor on the Hinds County Board of Supervisors (HCBS)³ or their designee, is responsible to the general electorate as defined in *Hawkins County*.

Another one-third, comprised of "representatives of the poor," is elected by each of the five supervisory districts of Hinds County. Recognizing that it would not be feasible to require prospective voters to provide verification of income, the bylaws provide that "all residents of Hinds County may vote in the Supervisory District in which they live."

In *Enrichment Services Program, Inc.*, 325 NLRB 818 (1998), a case like this one involving the political subdivision status of a nonprofit community action agency with a tripartite governing board, the Board held that individuals who administer an employer are responsible to the general electorate "only if the relevant electorate is the same as that for political elections." 325 NLRB at 820. In *Enrichment Services*, the relevant electorate of members of various low income neighborhoods was not "sufficiently comparable" to the general electorate since it did not include all individuals in the area served who would be eligible to vote in general elections. *Id.* at 819. In the instant case, however, the Employer's bylaws provide for complete identity between the relevant electorate for the representatives of the poor on the Employer's board of directors and the general electorate of the supervisory districts. Because the relevant electorate is the same as that for general political elections, I find that this third of the Employer's board of directors is comprised of individuals responsible to the general electorate. Accordingly, I find that a majority of the Employer's board of directors is comprised of public officials or individuals responsible to the general electorate under *Hawkins County* and that the Employer is an exempt political subdivision.⁴

that total membership must always be divisible by three. Currently, the board of directors consists of 15 members.

³ The parties have stipulated that the HCBS is the governing authority of Hinds County. Each of the five supervisors is elected by the general electorate in separate geographical districts.

⁴ The remaining one-third of the board of directors is comprised of representatives of private sector organizations. The board of directors selects the organizations that will participate, but each organization selects its own representative. In view of my finding with regard to the other two-thirds of the board of directors, it is unnecessary to determine whether these representatives of private sector organizations are responsible to public officials.

¹⁴ Factors listed by the Regional Director as supporting the conclusion that the Employer is *not* a political subdivision are that the Employer has no power of eminent domain, can purchase property, enters into its own contracts and applies for its own grants, and that the HCBS is not liable for the Employer's deficit spending. We note that none of these factors are considered by the Board to be determinative of employer status under Sec. 2(2). *University of Vermont*, 297 NLRB 291, 292 (1989) (finding that the employer satisfied the first prong of *Hawkins* even though it had no power of eminent domain and had the right to use, sell, or dispose of all its real estate and personal property); *City Public Service Board of San Antonio*, 197 NLRB 312, 313 (1972) (arm of government notwithstanding that the employer enters into its own contracts).

¹ Accordingly, I find it unnecessary to pass on whether the Employer is an entity created directly by the State so as to constitute a department or administrative arm of government.

² The Employer's bylaws specify that the board of directors may consist of as many as 33 members, but no less than 15 members and